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In The

Supreme Court of the United States

October Term, 1989

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner's opening brief discussed a confluence of factors which uniformly and powerfully support his construction of the restitution provisions at issue here: 1) the clear statutory language, 2) the legislative history directly answering the question presented, and 3) the rule of lenity applicable to the construction of criminal statutes. In response, the United States has filed a 47-page brief which argues at length from tangential or wholly immaterial sources and, only in the footnotes, discusses the controlling points which mandate reversal of the judgment. As we now show, the factors described above, the relevant policy considerations, and the facts of this particular case, join together to compel the result advanced by Petitioner.

1. Statutory Language. As we showed in our opening brief, Petitioner's construction of the scope of a district court's restitutory power is mandated by the plain language of § 3579(b), and §§ 3580(a) and (d). Section 3579(b) states that "in the case of *an offense* resulting in- . . . loss . . . of property of a victim of *the offense*," the court may require the defendant to "return *the property* to the owner of the property" (emphasis added). As the United States concedes (Br. 14), the term "offense," from § 3579(a), necessarily means the offense of conviction.[1]

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[1] See also Petitioner's Brief at 14-16; *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (language in second sentence must be read to refer back to prior sentence; "[t]o read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third").

This being so, it follows that the only property as to which restitution may be ordered under § 3579(b) is the property lost as a result of the offense of conviction. Tellingly, Respondent failed even to address the effect of this dispositive provision.

The United States further accepts (Br. 16) that the instructions in both § 3580(a) and (d) directing the district court, in determining the amount of restitution, to focus on the amount of loss sustained by a victim "as a result of the offense," refer only to the offense of conviction. Respondent nevertheless hopes to avoid the controlling language of § 3580 by asserting that the final clause of § 3580(a), which directs the court to consider "such other factors as the court deems appropriate," evinces Congress's intent to permit the court to order restitution for other offenses. But that catch-all clause, which is the entire statutory language basis for Respondent's expansive interpretation, simply cannot be read to override the more specific limitation in the very same sentence, much less the controlling language in § 3579(b). See, *e.g.*, *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("it is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . , particularly when the two are interrelated and closely positioned," and where both are parts of the same statutory section); *FPC v. Texaco, Inc.*, 417 U.S. 380, 394-95 (1974) (existence of separate catch-all provision "does not authorize the [interpreter] to set at naught an explicit provision of the Act").

Indeed, Respondent's interpretation would render meaningless those parts of §§ 3580(a) and (d) which require a sentencing court to consider the amount of the

loss sustained by any victim "as a result of the offense." Under Respondent's view, the court would be obliged to consider *any* losses the victim may have sustained as a result of any of the defendant's unlawful collateral acts. "It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute." *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530 n.15 (1985); *accord, South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510 n.22 (1986). Put to this test, Respondent's construction would not merely render superfluous the phrase "as a result of the offense" in § 3580(a), it would require that very different words—"as a result of any offense by the defendant"—be substituted in its stead.

Having found no solace in the statute's particulars, Respondent next urges the Court (Br. 17-23) to infer an unlimited "flexibility" from the VWPA's general statements of findings and purposes. But any suggestion that Congress contemplated restitution beyond the offense of conviction is disproved by the specific language of § 3579(a), which limits restitution to the victim of the specific offense of conviction—a limitation which the United States concedes. (Br. 14) This can best be understood by example. If Petitioner had been charged with misuse of one credit card from each of several different victims, instead of several credit cards from the same victim, then (as the United States concedes) restitution could only have been ordered for the offense of conviction. This being so, the conclusion is compelled that, in enacting §§ 3579(b) and 3580(a) and (d), Congress did not intend to provide for restitution beyond the offense of conviction under *any* circumstances, including those

cases in which the same individual or entity could be described as a victim of other offenses.[2]

In advancing this argument, Respondent fails to recognize that this Court historically has given only limited weight to general congressional purposes in interpreting the compass of criminal statutes. For example, in *Busic v. United States*, 446 U.S. 398, 408 (1980), this Court give short shrift to the argument that, because Congress intended to mete out stiff penalties for use of a firearm in the commission of a felony, it would not have followed any course inconsistent with that commitment. "[W]hile Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries." *Id.* Likewise, the broad congressional objectives behind the Comprehensive Drug Abuse Prevention and Control Act of 1970 failed to persuade this Court that Congress had

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[2] Moreover, as we show at pages 15-17 below, limiting restitution to the offense of conviction is in fact consistent with Congress's general balanced intent to provide for restitution limited by consideration of the defendant's rights and circumstances, the resources of the judicial system, and the need for "clear procedural rules." Congress served the broader purposes argued by Respondent in other ways as well. As part of the Comprehensive Crime Control Act of 1984 which recodified the restitution provisions, Congress enacted the Victims of Crime Act of 1984. P.L. 98-473 §§ 1401-05, 98 Stat. 2170-75 (Oct. 12, 1984). Pursuant to a part of that Act codified at 18 U.S.C. § 3013, Petitioner incurred a mandatory special assessment of $50. (J.A. 78) That assessment will be used in part to fund crime victim compensation. 42 U.S.C. §§ 10602-03.

incorporated the special parole term prescribed for substantive drug offenses into the penalty for a conspiracy or attempt to commit such an offense. *Bifulco v. United States*, 447 U.S. 381, 398-99 (1980). Again, in *McNally v. United States*, 483 U.S. 350, 369 (1987), this Court read the federal mail fraud statute restrictively, over a dissent urging that the congressional purpose in protecting the integrity of the United States mails compelled a broader reading. And in *Dowling v. United States*, 473 U.S. 207, 230 (1985), this Court interpreted the National Stolen Property Act restrictively, over a dissent protesting that the basic goal of that Act was not served thereby.

In short, §§ 3579(b) and 3580(a) and (d) unambiguously answer this case, particularly in view of the concededly clear limitation in § 3579(a). Respondent's arguments are based on inference at best, and they cannot overcome the plain language of these criminal statutes limiting restitution to the offense of conviction.

2. Legislative History. Respondent seeks to avoid the legislative history which directly answers the issue in this case--in Petitioner's favor—by relegating that history to two lengthy footnotes. (Br. 27-29 nn. 25-26) Examination of the legislative history of §§ 3579 and 3580, however, unequivocally supports our plain language construction.

The United States concedes, as it must (Br. 28-29 n.26) that the 1980 House Report accompanying the provisions in proposed legislation which two years later became the original 1982 version of §§ 3579 and 3580, "indicated that the drafters intended to adopt an 'offense of conviction' limitation on the amount of restitution." Indeed, the Committee report expressly stated that "[r]estitution may

only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 457 (1980), App. 9, *infra*.[3] Respondent nevertheless urges that this legislative history, directly on point, is "of little value" because it was not expressly repeated when the VWPA was enacted; and because the VWPA included some new general statements of its overall purpose to aid crime victims. Still, Respondent is forced to agree that the essentially identical provision in the 1980 bill to which the Report referred was in fact the "progenitor[]" of § 3579(b)(1)(A) of the VWPA. Thus Congress's intent in the original VWPA to limit the amount of restitution to the offense of conviction could not be clearer.

As it must, the United States further concedes (Br. 27-28 n.25) that the House Report accompanying the 1986 amendment to the VWPA cited to a footnote in an earlier report which flatly states that an order of restitution under the VWPA cannot extend to losses caused by defendant's conduct outside the offense of conviction[4]

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[3] The pertinent portions of the 1980 bill, denominated H.R. 6915, and the 1980 House Report are reproduced in the Appendix to this Brief.

[4] H.R. Rep. No. 1017, 98th Cong., 2d Sess. 83 n.43 (1984). Because this 1984 Report was specifically cited in Report No. 334 accompanying the 1986 amendment (and not merely as a "cryptic 'but see' citation"—see Resp. Br. 28 n.4 and Pet. Br. A-21 n.27) it is more than "post-enactment legislative history" as to the amended version of the statute which governs this case.

Respondent again labors to argue that this statement too "has little if any bearing" on this case. In support of its position, Respondent asserts preliminarily (Br. 26-27) that the 1986 clarifying amendment does not apply to Petitioner Hughey because of the Ex Post Facto Clause, citing *Miller v. Florida*, 482 U.S. 423, 429 (1987). Such an argument, however, misapprehends the purpose of the Ex Post Facto Clause. The Clause bars only subsequent *increases* in punishment; it is wholly inapplicable here. See *id.*; *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). Respondent's argument is also erroneous because, in § 79(b) of the 1986 Act, Congress expressly provided that the "clarifying" version was to go into effect upon enactment, see 100 Stat. 3619. Because the 1986 version did not work an increase in punishment, it applied to Petitioner at his sentencing—as the court below implicitly recognized. *See* 877 F.2d at 1258 n.2 (J.A. 90).

Respondent, it seems, would wish away the definitive House Reports by criticizing Congress's views on their "merits." (Br. 28 n.25) Thus, Respondent argues that Congress's stated intention should be accorded no weight because the 1984 House Report supposedly "offers no coherent basis" for its explanation as to how VWPA restitution is limited to the offense of conviction. Such an argument, however, is doubly misguided: first, because Congress's intent is Congress's intent—regardless of its "coherence," and second, because the plain language does limit restitution to the specific offense of conviction. See pages 1-3, *supra*. Respondent similarly suggests that this Court should ignore Congress's express decision to restrict restitution to the offense of conviction, based on Congress's belief that a broader rule "would deprive the

defendant of property without due process of law," because in Respondent's view, Congress was wrong. This too is completely misguided for the inquiry is not whether Congress was "right" or "wrong" but, rather, what Congress intended.[5]

Turning to less direct historical evidence, Respondent next contends (Br. 30) that, in enacting the VWPA, "Congress legislated against a familiar common law background relating both to the nature of restitution as a penal sanction and to the permissible scope of penal restitution orders." To the contrary, Congress enacted the VWPA against a long-standing *statutory* framework, commencing with the 1925 probation act[6] and continuing in the 1948 Federal Probation Act ("FPA"), which uniformly limited restitution to the offense of conviction. See Petitioner's Brief at 20-21. Viewing the VWPA against the backdrop of the legislative history reveals that where Congress intended to effect a major change from that familiar statutory framework, it did no directly, with demonstrated awareness of the change. See *id*. This being

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[5] See, *e.g.*, *Lowe v. SEC*, 472 U.S. 181, 205-206 n.50 (1985) (" '[i]n areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties.' ") (citation omitted).

[6] Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259, 1260 ("While on probation the defendant may . . . also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by *the offense for which conviction was had* . . . . ") (emphasis added).

so, it is far more reasonable to conclude that Congress perpetuated the limitation of restitution to the offense of conviction in fewer words than it is to surmise, as Respondent would, that Congress effected a radical change in that criminal penalty by implication.

Finally, Respondent argues (Br. 32-34) that the scope of restitution under the VWPA may be divined by consideration of state restitutory schemes. There is simply no support for this suggestion. The legislative record reveals no evidence that Congress patterned the *scope* of the VWPA's restitution sanction upon any state model, or that Congress even considered doing so. The only direct comparison documented was to the FPA, and the only significant expansion of that statute, to non-probationary sentences, was expressly acknowledged and properly explained. S. Rep. No. 532, 97th Cong., 2d Sess. 32 (1982). Respondent would have this Court accord greater weight to state restitutory schemes not shown to have been emulated by Congress, than to Congress's own pronouncements explaining 1) that the progenitor of the VWPA would have limited restitution to the offense of conviction, 2) that the VWPA was so limited, and 3) that the VWPA was being amended to eliminate any possible misunderstanding that it was so limited.[7]

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[7] Respondent's reliance on a number of state cases (Br. 34-36) fails for the same reasons. Simply put, a congressional reference to a state court opinion extolling the importance of restitution as a criminal sanction (Resp. Br. 33 n.29) does not even begin to show that Congress adopted all aspects of that state's system. Without exception, moreover, those cases involved orders of restitution imposed as a condition of probation.

3. Rule of Lenity. In a footnote (Br. 17 n.14), Respondent argues that "[i]n support of his reading of the statute, petitioner seeks refuge in the rule of lenity." Respondent's effort to disparage the rule is perhaps best answered by statements made by this Court just last month in *Crandon v. United States*, 58 U.S.L.W. 4234, 4236, slip op. at 5-6, 110 S.Ct. 997 (Feb. 27, 1990):

> [B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [the provision] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

As this Court emphasized, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute *broader* than that clearly warranted by the text." *Id.*, slip op. at 7 (emphasis added).

As we have shown, the statutory language and legislative history are squarely in Petitioner's favor. But even if this were not the case, the statutory provision upon which Respondent rests its case is nothing more than a catch-all phrase instructing the court, in fixing the amount of restitution, to consider as well "such other factors as the court deems appropriate." *See* § 3580(a). Even if this clause is deemed ambiguous—which is the

best that Respondent can possibly hope for—"any" ambiguity must be resolved in Petitioner's favor under the "time-honored" rule of lenity.[8]

4. Policy Considerations. Respondent argues at length policy considerations which are more properly addressed to Congress, not to this Court. Indeed, as we have demonstrated, the United States' admission that § 3579(a) limits restitution to victims of the single offense of conviction directly contravenes its assertions that Congress intended a policy of limitless victim restitution. Rather than giving courts unlimited restitutory authority, Congress opted for a balanced approach which recognizes that a victim's complete recovery under the VWPA may, as a purely practical matter, be limited by a defendant's rights and particular circumstances, as well as by

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[8] As our opening brief also showed (Pet. Br. 27-31), a statute should be construed to avoid grave and doubtful constitutional questions. The cases cited by the United States (Br. 41-42) as having upheld the constitutionality of the VWPA did not involve orders of restitution beyond the offense of conviction where there was no plea agreement or other special justifying circumstances. To the contrary, a court of appeals has observed in a case like this one, that "[i]f a defendant were held liable for restitution to victims of crimes of which no jury had found him guilty, a due process violation may very well occur." *United States v. Satterfield*, 743 F.2d 827, 839 n.10 (11th Cir. 1984); *see also United States v. Durham*, 755 F.2d 511, 514 (6th Cir. 1985) (the "absence of an effective admission or full adjudication of the fact of injury, as opposed to the extent of injury, may put [this defendant's] claims on different constitutional footing than those advanced in" the cases relied on by the United States). The interest in avoiding a decision on that constitutional issue is a further point in favor of the interpretation Petitioner advances herein.

constraints upon the courts' adjudicatory time and resources. See 1980 House Report at 457, App. 9, *infra*, (noting that the precursor of § 3579(b) was drafted to resolve competing views "in an equitable manner").

In any event, Respondent's policy argument that victim restitution will wither away unless its desired construction is adopted is wrongheaded. Respondent suggests (Br. 22) that the restrictive view of the restitutory authority has two "untenable consequences," one of putting the prosecutor to the hard choice of either going to trial on a larger number of counts or sacrificing the interests of victims, and the other of diminishing the incentive to plead guilty. Neither argument has substance. The "hard choice" is the same choice faced by prosecutors in every case in which disposition by conviction of less than the total conduct alleged in the indictment is contemplated. Prosecutors must routinely evaluate whether a given disposition will expose the offender to a sufficient measure of penal sanctions, whether those sanctions be imprisonment, fine, or restitution. To be sure, prosecutors have far more flexibility to insist upon restitution beyond the offense of conviction as part of a plea agreement than they have to vary other incidents of punishment.

Similarly, Respondent errs in asserting (Br. 22-23) that limiting restitution to the offense of conviction, or to the amount specifically agreed upon in the plea agreement, will diminish a defendant's incentive to plead guilty. On the contrary, to the extent that the decision to plead guilty is motivated by a defendant's desire to reduce punishment, such a limitation would promote guilty pleas. Moreover, where the prosecutor and defendant can

specifically agree on an amount of restitution, thereby taking the guesswork out of that portion of the overall penalty, a negotiated settlement of the case is far more likely. A defendant who wishes to make restitution beyond that comprehended by the offense of conviction, whether motivated by genuine remorse, moral obligation, the desire to mitigate punishment, or by some combination of reasons, is free to do so. A defendant may pay restitution, execute a promissory note, or promise to make future payment of agreed restitution in exchange for dismissal of counts. The federal sentencing guidelines have specifically recognized voluntary payment of restitution in advance of adjudication as a factor in mitigation of punishment. U.S.S.G. §3E1.1, comment. (n.1(b)).

Respondent is also wrong in its startling assertion (Br. 20-23) that its expansive reading is necessary because federal prosecutors routinely are unwilling to base their plea bargaining decisions on victims' interests. There is simply no sound basis for the view that prosecutors are now short-changing victims, and even if that were true, the notion that the courts should intercede to remedy the prosecutors' failings is patently absurd. Under the waiver theories developed by the courts of appeals, prosecutors have flexibility to enter into a plea agreement whereby the defendant specifically agrees to make restitution beyond the offense of conviction.[9] While Respondent refuses to recognize an "admissions exception" in the VWPA, its brief (Br. 23-25) acknowledges cases showing

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[9] See, *e.g.*, *United States v. Kirkland*, 853 F.2d 1243, 1251 (5th Cir. 1988); *United States v. Berrios*, 869 F.2d 25, 32, 33 (2d Cir. 1989).

that the courts' enforcement of bargained plea agreements calling for excess restitution has proven fully workable under the FPA. Thus there is no difficulty to be rectified.

Lastly, Respondent (Br. 36-38) seeks to find policy support in the new federal sentencing guidelines, which would consider the total losses in a case such as this. But even apart from the fact that those guidelines do not govern the case at bar because the offense was committed before their effective date, what Respondent fails to appreciate is that those guidelines have no effect upon the scope of a restitution order. The guidelines, it need be noted, prescribe only the non-restitutory components of a sentence, such as the availability of probation or the length of imprisonment. By contrast, the *Guidelines Manual* provides no formula for calculating restitution, stating instead that restitution is to be imposed in accordance with the governing statute. U.S.S.G. §5E1.1(a).

More generally, Respondent suggests (Br. 38) that, under a "real offense" approach to sentencing, courts are free to impose restitution orders beyond the offense of conviction. This argument too is without merit. Respondent's policy argument cannot overcome the clearly expressed choice of Congress to the contrary, or the rule of lenity. Furthermore, restriction of restitution to losses flowing from the offense of conviction does not diminish in any significant respect a court's overall discretion. Courts remain free to look to factors beyond the offense of conviction as to all other aspects of the sentence, within the penalty range provided for that offense. Those aspects include whether to incarcerate, the length of incarceration, the duration and conditions of probation and

supervised release, and the amount of a fine. Moreover, where plea agreements expressly provide for additional restitution, courts may impose such orders.

While Respondent's policy arguments are both unavailing and wrongheaded, there are substantial policy interests which support the decision evidently made by Congress. To begin, this Court has recently recognized that Congress seeks "to reach a workable balance between" competing interests when it legislates. *John Doe Agency v. John Doe Corp.*, 110 S.Ct. 471, 475 (1989) (citation omitted). Indeed, the 1980 House Report accompanying H.R. 6915, the precursor of the VWPA, explicitly states that "the subchapter establishes clear procedural rules for the imposition of a sentence of restitution." 1980 House Report 456, App. 7, *infra*. Respondent, however, proposes a definition which is not only unclear, but is also boundless and unworkable. Under Respondent's view of the statute, the sentencing court could order "restitution" to any victim of the offense of conviction for any loss which the court believes the defendant caused that victim at any time. Thus the court could order restitution for events occurring years earlier. Or it could order restitution for wholly unrelated transactions. Under Respondent's construction, expanded restitution orders could be based entirely on hearsay[10] with findings supported by a mere preponderance of the evidence. Not only is such a construction wholly inconsistent with Congress's expressed

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[10] The Federal Rules of Evidence, except the rules with respect to privileges, do not apply to sentencing proceedings. Rule 1101(d)(3), Fed.R.Evid.

intent to have "clear procedural rules," it is plainly unworkable, and this Court should "decline to read the statutes to produce such an ungainly result." *Busic v. United States*, 446 U.S. at 411.

Petitioner's point is further reinforced by reference back to the congressional findings and declaration of purposes of the VWPA, argued by Respondent. One of the stated purposes was "to ensure that the Federal Government does all that is possible *within limits of available resources* to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." P.L. 97-291 § 2, 96 Stat. 1248-49 (Oct. 12, 1982) (emphasis added). The demands of normal criminal adjudication presently burden the federal courts beyond the limits of existing and foreseeable resources. Yet under Respondent's extravagant construction, restitution would be governed not by a "bright line" offense of conviction standard, but by a standard without clear boundaries, thus creating additional demands which cannot be met within the limits of available court resources.

Finally, Respondent's construction of the statute would introduce an intolerable degree of uncertainty into the restitution component of criminal sentencing, while compromising fairness as well.[11] The "need to provide

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[11] Respondent and *amici curiae* would skew the fine balance of interests struck by Congress in limiting restitution to losses established by conviction. A defendant in a civil suit can litigate vigorously with no risk beyond the claim in issue. The criminal defendant must litigate what would otherwise be civil damage claims, with sharply diminished procedural protections, before the same judge who will shortly pass sentence on

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restitution to any victims of the offense" is but one of seven prescribed sentencing factors under the Sentencing Reform Act[12] from which Respondent argues. (Br. 36-38) A more fundamental purpose of that Comprehensive Crime Control Act, of which the recodified restitution provision is now also a part, is to "provide certainty and fairness in meeting the purposes of sentencing," and to "avoid[] unwarranted sentencing disparities among defendants with similar records *who have been found guilty of similar criminal conduct* . . . . " 28 U.S.C. § 991(b)(1)(B) (1984). Departing from the bright line of losses established by the conviction would inevitably introduce unwarranted sentencing disparities, a consequence which promotes disrespect for the law, which is unfair to defendants, and which Congress has strenuously sought to avoid. The line consistently drawn by Congress, from the 1925 federal probation act to the current statute, limits court-ordered restitution as a criminal penalty to losses established by the offense of conviction. That clearly defined line serves not only the interests of defendants but the larger interests of the criminal justice system, and thus the people as a whole.[13]

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him. A defendant who has a legitimate dispute as to a victim's extra-conviction claim for restitution would risk the perception of the court that he has not accepted responsibility for his conduct, which could adversely affect his plea for leniency. If that defendant should elect not to dispute a dubious claim, for fear of prejudicing other aspects of his sentence, it will result in a plenary order of restitution equivalent to a civil judgment.

[12] 18 U.S.C. § 3553(a)(7) (1986).

[13] The question that largely concerns the *amici curiae*—the scope of restitution that may be ordered in offenses involving

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5. Petitioner's Case. As our opening brief showed, Petitioner consistently objected to any restitution beyond the offense of conviction and refused to acknowledge any guilt or liability for any other offense. Respondent (Br. 25) wrongly suggests to the contrary. While it is true that Petitioner offered to make restitution in the amount of $10,412, the sum of the losses on the Godfrey credit card (J.A. 32, 35, 44, 47, 74), that offer did not constitute any acquiescence in a restitution order beyond the offense of conviction. By its terms, 18 U.S.C. § 1029(a)(2) permits aggregation of transactions and, hence, all unauthorized uses of the Godfrey credit card fell within the compass of the offense of conviction. Moreover, the United States does not, and cannot, suggest that the Petitioner ever acquiesced in an order to make restitution in excess of the amount attributable to the Godfrey card, namely, $10,412. In this respect, Petitioner's stance as to restitution was entirely consistent with the trial judge's advice during the guilty plea proceeding in which Petitioner was informed that he might be required to make restitution for losses suffered as a result of the offense to which he was pleading guilty. (J.A. 9) The short of the matter, simply put, is that the only way Petitioner can be ordered to make restitution for losses outside the offense of conviction is if the statute authorizes the court to order such restitution in the absence of an agreement or other special circumstances. Since we have shown that the court does not

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schemes or conspiracies—simply is not presented here, as our opening brief showed (Pet. Br. 32-33), and as the United States agrees (Resp. Br. 14 n.12).

have that authority, the judgment in this case must be reversed.

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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March 15, 1990

APPENDIX

96th CONGRESS
2D SESSION

H.R. 6915

To revise title 18 of the United States Code, and for other purposes.

* * *

TITLE I—REVISION OF TITLE 18

* * *

SUBTITLE III—SENTENCING AND CORRECTIONS

* * *

§ 3101. Purposes of sentencing

The purposes of sentencing are to—

(1) assure that the severity of the sentence is proportionate and directly related to the culpability of the offender and the harm done;

(2) assure that offenders convicted of similar crimes committed under similar circumstances receive similar sentences;

(3) promote respect for the law;

(4) provide adequate deterrence to criminal conduct;

(5) protect the public from further crimes by the defendant;

(6) provide the defendant with needed education, vocational training, medical care, and other correctional treatment in the most effective manner;

(7) provide restitution to victims of offenses; and

(8) reconcile the victim, community and offender.

§ 3102. Factors to be considered in sentencing

The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the purposes of sentencing set forth in section 3101 (relating to purposes of sentencing) of this title;

(3) the kinds of sentences available, including effective alternatives to imprisonment; and

(4) applicable sentencing guidelines under chapter 43 (relating to sentencing guidelines) of this title in effect on the date of sentencing.

* * *

SUBCHAPTER III—RESTITUTION

§ 3331. Applicability of restitution

A defendant who is found guilty of an offense may be sentenced to make restitution to a victim of the offense unless—

(1) the offense is a violation of subchapter VII (relating to investment, monetary, and antitrust offenses) of chapter 25 of this title or section 2536(b) (relating to fraud in a regulated industry) of this title; or

(2) the offense is a class A felony, the defendant is an individual, and no other sentence is imposed on the defendant for such offense.

§ 3332. Nature of sentence of restitution

(a) A defendant may be sentenced under this subchapter—

(1) in the case of an offense resulting in bodily injury, to pay necessary medical expenses attributable to such injury; and

(2) in the case of an offense resulting in loss, damage, or destruction of property—

(A) to return such property; and

(B) if return of such property under subparagraph (A) of this paragraph is impossible or impractical, to pay an amount equal to the greater of the value of the property on the date of the loss, damage, or destruction, or the value of the property on the date of sentencing, less the value (as of the date of sentencing) of any part of the property returned under subparagraph (A) of this paragraph.

(b) The court shall not impose a sentence of restitution under this subchapter if such imposition will unduly complicate or prolong the sentencing process.

(c)(1) The court shall not impose a sentence of restitution with respect to a victim who is a party to any judgment, settlement, or agreement under which

such victim has received or is to receive compensation for the injury, loss, damage, or destruction caused by the offense for which the defendant is convicted.

(2) Any amount paid to a victim under a sentence of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

§ 3333. Consideration in sentencing to restitution

The court, in determining whether to impose a sentence of restitution and the nature and conditions of such sentence, shall—

(1) consider the factors set forth in section 3102 (relating to factors to be considered in sentencing) of this title; and

(2) give primary consideration to the purposes of sentencing set forth in section 3101(a) (1), (2), (3), (4), (5), (7), and (8) (relating to purposes of sentencing) of this title.

§ 3334. Conditions of sentence of restitution

(a) The court may require, as a condition of a sentence of restitution, that the defendant make restitution within a specified period or in specified installments, but such period shall not be greater

than the maximum term of conditional discharge, probation, or imprisonment for the offense, whichever is greatest. If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(b) The court may not impose any condition of a sentence of restitution other than the conditions described in subsection (a) of this section.

§ 3335. Making of restitution relating to organizations

If a sentence of restitution is imposed on an organization, it is the duty of each individual authorized to transfer property for the organization or make disbursement of assets of the organization to return such property or pay restitution from assets of the organization as required by such sentence.

§ 3336. Enforcement of sentence of restitution

A sentence of restitution may be enforced by the United States in the same manner as a judgment in a civil action.

96th Congress) (Report
2d Session) (No. 96-1396

HOUSE OF
REPRESENTATIVES

CRIMINAL CODE REVISION ACT OF 1980

REPORT

together with

ADDITIONAL SEPARATE, SUPPLEMENTAL,
AND DISSENTING VIEWS

OF THE

COMMITTEE ON THE JUDICIARY

TO ACCOMPANY

H.R. 6915

[Including Cost Estimate of the
Congressional Budget Office]

* * *

SUBCHAPTER III—RESTITUTION

This subchapter breaks new ground in Federal law by explicitly recognizing the importance of restitution as a criminal sanction. *See generally* Galway & Hudson, *Offender Restitution in Theory and Action* (1978); Barnett and Hagel, *Restitution, Retribution, and the Legal Process* (1977); Hudson & Galway, *Restitution in Criminal Justice: A Critical Assessment of Sanctions* (1977); J. Hudson, *Restitution in Criminal Justice* (1974). While current Federal law permits a court to require the payment of restitution as a condition of a suspended sentence, this subchapter makes restitution a separate and distinct sentence. Under the

proposed code, an offender can be sentenced to restitution alone or in combination with any other sentence (such as a fine and/or a prison term). In another significant improvement over current law, the subchapter establishes clear procedural rules for the imposition of a sentence of restitution. For example, it describes the nature of the property loss which is compensible [*sic*], and establishes set-off requirements against any subsequent court penalties. Current Federal law (18 U.S.C. 3651) simply limits the use of restitution to cases where it is "deemed best" by the court.

The increased emphasis on the use of restitution has been reflected in recent State enactments. 18 Pa.Cons.Stat.Ann. section 1106 (Purdon) (West Cum. Supp. 1980-81); 1979 Wash. Legis. Serv. ch. 29, pp. 39-1005-5-6; Iowa Code Ann. section 907.12 (1979); New Jersey Code of Crim. Justice, 2 C:43-2 (1980).

§ 3331—Applicability of restitution

This section provides that restitution may be imposed on a criminal defendant unless the offender is an individual convicted of a class A felony or an organizational defendant charged with certain specified antitrust and regulatory offenses. The Committee concluded that these offenses already provide sufficient civil and administrative remedies; therefore, victims of such offenses are adequately protected by current law. For example, an antitrust violation can lead to civil suits and to treble damages. See 15 U.S.C. 15. The Committee is concerned [*sic*] that the use of restitution not become a substitute for complex civil litigation led to the exclusion of

regulatory offenses from section 3331. As provided in section 3332(6), "[t]he court shall not impose a sentence of restitution . . . if such imposition will unduly complicate or prolong the sentencing process." The Committee determined that the regulatory offenses referred to in section 3331 were so complicated as to merit statutory exclusion.

§ 3332—Nature of sentence of restitution

Under current Federal law (18 U.S.C. 3651), a court may require restitution as a condition of a suspended sentence. Thus a defendant "may be required to make restitution or reparation to aggrieved parties for *actual damages* or loss caused by the offense for which conviction was had" (emphasis added). Unfortunately, courts have not interpreted current law in a uniform manner. For example, indirect victims of antitrust violations, such as community agencies, are sometimes considered "aggrieved parties" under section 3651, *United States v. White Stag Manufacturing*, No. 76-75 (D. Or. 1977), and sometimes not. *United States v. Clovis Retail Liquor Dealers Trade Association*, 540 F.2d 1389, 1390 (10th Cir. 1976).

Finally, it is also unclear whether current law permits a court to make a restitution order in compensation for events or actions which are not directly proven at a trial or as a result of a guilty plea. *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950) (restitution limited to a count of conviction. *Compare United States v. Peuchler*, 557 F.2d 1002 (3d Cir. 1977), *with United States v. Landay*, 513 F.2d 306 (5th Cir. 1975), and *United States v. Tiler*, 602 F.2d 30 (2d

Cir. 1979) (restitution conviction upheld where defendants were convicted of a violation of 18 U.S.C. 371 even though actual damages had not been ascertained—in part because all that had been required by the district court was the payment of a sum to the clerk as a contingency for when damages had been established).

Section 3332 resolves the conflicts and ambiguities of current law in an equitable manner. Subsection (a) provides that an offender may be required to make compensation to the victim of an offense in two circumstances. Restitution may only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed.

Restitution is appropriate for offenses involving conduct that produces bodily injury and for offenses involving property damage. In the case of bodily injury, restitution is limited to "necessary medical expenses." A defendant who inflicts property damage has two options. If the property remains available, the offender may return it. If the property can not be returned, the offender is to pay the higher of the market value of the property at the time of the offense or at the time of sentencing. This formulation places the victim of the crime in the most advantageous situation possible, relative to the valuation of the property. The term "property" is defined in section 101 of the proposed code. The Committee does not intend to limit the concept of payment of monetary compensation. If a victim and an offender can agree, the offender may render a service instead.

The Committee intends that the term "victim" be defined to include persons or groups who would not have suffered but for the offender's conduct. American Bar Association, *Sentencing Alternatives and Procedures* standard 19-2.4, comment at 35 (2d ed. tent. draft 1979). However, the Committee does not intend to include insurance companies or other sureties within the definition of "victim."

Subsection (b) expresses the Committee's concern, noted earlier, that the sentencing proceeding not become a protracted "mini-trial" of a civil nature.

Subsection (c) provides that the court shall not order restitution if the victim has received a judgment or settlement (including an insurance settlement) in a proceeding involving the same injury or property loss, damage or destruction. It would, of course, be contrary to public policy for an insurance company to refuse to pay a victim on the ground that the victim might be awarded restitution upon conviction of the wrongdoer. Any amount paid to a victim under a sentence of restitution shall, pursuant to subsection (c)(2), be set off against any money later recovered in any Federal civil proceeding, or in any state proceeding. These provisions ensure that the victim does not receive double compensation for the same injury.

The Committee considered, but rejected as unnecessary, a provision making the ordering of payment of restitution inadmissible in a subsequent criminal or court proceeding in federal cases. The Federal Rules of Evidence protects the offender against prejudicial use of such information. Fed.R.Evid. 403. In addition, it is obviously necessary to refer [*sic*] restitution award in

subsequent civil actions to enforce the award. Finally, the failure to make restitution would be admissible for impeachment purposes. Fed. R. Evid. 801.3(21) and (22). The Committee also concluded that it would be inappropriate, and perhaps unconstitutional, to create such a Federal rule of evidence for the States.

§ 3333—Considerations in sentencing to restitution

This section provides that the court shall give primary consideration to all of the purposes of sentencing, except the defendant's need for rehabilitative services, set forth in Section 3101 of the proposed code. In addition, the court shall consider the nature of the offense and the offender, the need to use effective non-prison sanctions, and the applicable sentencing guidelines. As one court put it:

> Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. The probationer may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life. Conditioning probation on making restitution also protects the community's interest in having the victims of crime made whole.

Huggett v. State, 266 N.W.2d 403, 407 (Wis.1978)

§ 3334—Conditions of sentence of restitution

This section authorizes the payment of restitution in installments. In addition, it limits the available time

period for making such payments to the point when any other sentence would expire. This provision closely follows the recommendations of the National Conference of Commissioners on Uniform State laws. *See* Model Sentencing and Corrections Act section 3-601(c) (1979).

§ 3335—Making of restitution relating to organizations

This section, likes its counterpart in section 3505 of the proposed code (relating to the payment of fines by an organization) creates an affirmative duty by responsible persons within an organization to make court-ordered restitution.

§ 3336—Enforcement of sentence of restitution

This section authorizes the government to take steps to enforce a restitution award in the same manner as if it had obtained a civil judgment. It does not create a right of action against the United States by the person to whom the restitution is to be paid.